IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

D.B. INCOME TAX APPEAL NO. 44/2004

Commissioner of Income Tax-II Vs. Shiv Ratan Soni
Aaykar Bhawan, Jodhpur.

Date of Order :: 28.03.2007

PRESENT

HON'BLE MR JUSTICE RAJESH BALIA
HON'BLE MR JUSTICE BHANWAROO KHAN

Mr Sangeet Lodha, for the petitioner.
Mr Anjay Kothari, for the respondent.

BY THE COURT (PER HON'BLE JUSTICE R.BALIA):

This appeal is directed against the order of Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur dated 26.5.2003 and relates to Assessment Year 1986-87. The order of the Tribunal is common deciding appeals arising out of Assessment Year 1986-87 to 1988-89.

The brief facts giving rise to this appeal are that the assessee is engaged in the activity of money lending and gold smithy. A search was conducted in the premises of the assessee on 18.11.1988 and following assets/valuable articles were found :-

a]- Business income :- Rs.24,00,000
(Including money lending and pawaing)

b]-	Investment in house :-	Rs. 3,73,000
c]-	Unaccounted marriage expenses :-	Rs. 1,50,000
		Rs.29,23,000

Besides those, some papers were also found during the course of search.

During the course of assessee's statement under Section 132(4), he agreed to surrender Rs.24,00,000 as his income from money lending and gold smithy business, investment, unexplained investment in house amounting to Rs.3,73,000 and unaccounted marriage expenses amounting to Rs.1,50,000. In all Rs.29,23,000 were surrendered as his income from money lending and goldsmithy which is represented through aforesaid assets found during the search.

As a result of search, order under Section 132(5) was passed by Assistant Commissioner of Income Tax, Ward-I, Jodhpur, with previous approval of Deputy Commissioner, Income Tax, Jodhpur, for the purpose of retaining the assets seized during the course of search by estimated assessment of the tax liability which may arise as a result of material discovered during the aforesaid search.

In the case of assessee, he assessed the tax liability for three Assessment years 1986-87, 1987-88 and 1989-90 to the tune of Rs.18,11,000/-.

After the order under Section 132(5) on 10.3.1987, notices under Section 148 were issued for Assessment Years 1986-87, 1987-88 and 1988-89. Year 1989-90 being the assessment year relevant to previous year ending on 31.3.1989 during which search was conducted, the necessity of issuing notice under Section 148 did not arise.

The Tribunal has quashed the notices issued under Sec. 148 inter alia on the ground that the satisfaction of Income Tax Officer about the escapement of income could not be discovered from the reasons stated by him which are vague and which are not founded on existing material on applying his mind thereto and the notices have been issued purely following the order passed under Section 132(5) without application of his mind to the material before it. It was pointed out that in the order under Section 132(5) itself it has been stated that material found during search shall be looked into by the Assessing Officer during the assessment proceedings clearly indicates that order under Section 132(5) itself was not founded on any analysis of the documents or material seized during search. Hence, it could not provide basis for formation of necessary belief required under Section 147 before

issuance of notices under Section 148.

The appeal relating to assessment year 1988-89 against the very same order was dismissed by this Court finding that the Assessing Officer has interpolated the record and has recorded his reasons by antedating the same after issuing notices. This Court found from the material produced before it that in the note sheet dated 30.9.91 he has referred to the notices issued in October,1991 and served in October,1991 which was clear demonstration of the fact that assessing officer has tampered with the record and tried to create the record to support the notices under Section 148 which had been issued without fulfilling the condition precedent before issuing the same.

The Assessing Officer is not required to give an opportunity to the assessee before resorting to Section 148. But he is required to record his reasons in writing about his satisfaction related to escapement of income from assessment of tax before issuing notices and validity of such notices, if the same is challenged, have to be judged in the light of reasons recorded by the assessing officer, as they are only material by which process of reaching subjective satisfaction by the Assessing Officer can be looked into by the Court within its power of judicial review, or even by the Appellate Authority. If the validity of notice is challenged. The fulfillment of required

condition precedent has to be established and the reasons recorded before issuance of notice gives a peep into the mind of the officer, who assumed jurisdiction to initiate proceeding under Section 147/148 of the Income Tax Act, 1961. Therefore, recording of reasons before issuing notice is an essential pre-requisite and failure to do so results in vitiating the proceedings.

Since from record of 1986-87 and 1987-88, this discrepancy is not visible from the record produced before us, we may not follow our conclusion in relation to year 1988-89. However, one factor which is common in the recorded reasons in all three years is that it refers to order under Section 132(5) framed by the Assistant Commissioner, to which we have referred to above. The amount of escaped income filled in the form provided for submitting to the Commissioner for seeking his approval before issuing notice tallies with assessment made by the Assistant Commissioner in order under Section 132(5) at verbatim and does not refer to any material or the contents of material from which he has drawn his own conclusion or has satisfied himself about the conclusion drawn by the authority making an order under Section 132(5) for the purpose of retaining the seized assets against the possible future liability.

The reasons which found place in the

communication made to the Commissioner for seeking his approval, reads as under :-

> "According to Sec. 132(5) & Seized records the assessee under assessed with reference to undisclosed investment & under assess of business income. Hence I have reason to believe that assessee's income has escaped for taxes."

In Clause No.6 of the format, the quantum of income shows escaped assessment from the tax for the year 1986-87, to be Rs.2,41,300. The authority passing order under Section 132(5) has assessed income of undisclosed income for the year 1986-87 at Rs.2,60,000. By deducting the amount already disclosed by the assessee in return submitted for the year 1986-87 balance Rs.2,41,300/- has been stated to be the income that has escaped assessment.

Even without entering into the controversy for the time being whether for the purpose of considering the validity of notice under Sec. 148 only, the reasons submitted before the Commissioner is relevant, but reasons, if any, recorded in the note-sheet of proceeding of Assessing Officer independently to communicate to the Commissioner for his approval are relevant, it would be apposite to refer to the reasons recorded in the note-sheet dated 14.10.1991, which are reproduced as under :-

> "Assessee income under assessed in A.Y. 1986-87. Income assessed Rs.18,700 as per filed return only but as per 132(5) order passed by the assessing officer and on the basis of seized records assessee income for A.Y. 1986-87 should be assessed Rs.2,60,000. Hence I have reason to believe that assessee's income under assessed during A.Y. 1986-87. Therefore, action u/s 148 is compulsory required. Time limit for issue of notice u/s 148 lapsed prior approval in this case required. Necessary form regarding worthy CIT permission in this case has been send as on 14.10.91 through D.C. Range."

Apparently, this note-sheet is prepared after sending the form, containing reasons on the basis of which approval of the Commissioner for proposed action is sought. After sending the format alongwith reasons recorded by him to the Commissioner for his approval, reason, if any, recorded cannot be a basis for seeking approval of Commissioner.

Apparently, apart from whether the order dated 14.10.91, on the order-sheet or the reasons placed before the Commissioner seeking his approval, for some unacceptable reasons, appears to have not been acted upon and another formate with the same reasons in the same form as earlier was issued on 13.11.1991 because the assessing officer has received a communication dated 29.10.1991 inquiring about the fact whether the proposed action is required to be

taken under Section 147(a) as existed prior to amendment of Section 147 w.e.f. 1.4.1989 or the amended provision of Section 147.

However, there is no change or additional reasons which have come to be recorded prior to seeking approval vide letter dated 13.11.1991.

Learned counsel for the appellant has urged that the order passed under Sec. 132(5) was relevant material for the purpose of forming necessary belief about the escapement of income from assessment to tax or was under assessment by the assessing officer and since there is relevant material having nexus with the formation of the belief, further enquiry in the adequacy and sufficiency of the material for holding such belief, as if the belief has to be formed objectively is not permissible.

On the other hand, learned counsel for the respondent has urged that the order passed under Section 132(5) may be a relevant material, but the reasons recorded by the assessing officer must show independent application of mind in respect of facts and material which has gone into consideration under Section 132(5). He further contends that the Assessing Officer cannot abdicate his function of his own application of mind to facts to authorities passing order under Sec. 132(5). In other words, it cannot be

a borrowed satisfaction unless a basic nexus is established between the formation of belief on application of mind by the Assessing Officer with the material, considered by him.

In the present case, one thing is apparent that the assessing officer has not referred to any specific material in any of the reasons recorded by him which could give rise to a clue as to the process by which he could have related any material found during search to be the income escaped from assessment for the assessment year in question. In the absence of any such material finding reference in the reasons recorded by the Assessing Officer, the reasons recorded by the Assessing Officer remain very vague. Reasons recorded before initiating proceeding under Section 148 if need record to find some material which could be related by Court to satisfaction of Assessing Officer, does not satisfy the test of an honest belief or satisfaction reached by Assessing Officer about escapement of the income before issuance of notice. It remains an action more on suspicion. Law requires where Assessing Officer has reason to believe and does not rest at his reason to suspect that income of the assessee has escaped assessment. Such a stand cannot be supported on specious plea that one can make a search or enquiry into any material on record which is relevant for the assessment year for holding the belief whether income for particular assessment year has escaped assessment.

If that were so, Legislature would not have provided an important safeguard against unnecessary harassment that reasons for such belief must be recorded before issuance of notice, and the existence of such satisfaction has to be supported within the parameter of reasons and not outside. One does not have to remember the contents of material that has gone into consideration but material that has gone into consideration must have specific reference so that check on ultra vires exercise of powers can be effectively exercised through judicial review.

Stating that considering the material seized during the search is infinitely vague, it does not refer to any material referable to assessment year in question. One is left stranded to exercise in the heap of documents to find a supportive material which the officer himself may or may not have seen. It need to be kept in mind that for issuance of notice under Section 147 for each assessment year the material on the basis of which the Assessing Officer could found his belief must relate to concern period and must have relevant nexus to formation of belief about escapement of tax relevant for assessment year for which re-assessment proceedings are initiated. Therefore, the order passed under Section 132(5) for retaining seized assets may or may not have any relevance to income of any particular assessment year. In the absence of which no valid foundation for initiating proceedings under Section 148

can be laid. Permitting otherwise would be taking away the only limited safeguard provided to the assessee, against enormous powers conferred on the Assessing Officer for opening a completed assessment time and again.

A vague reference of 'material found during search' on the basis of which subjective satisfaction has been arrived at, in the present case so much so during the long course of hearing not a single document could be referred having relevance to escapement of income from tax for period in question except the order under Section 132(5).

A perusal of Section 132(5) goes to show that primarily retention of assets seized during search against the possible estimated liability that may be created is not in exercise of finding the undisclosed income for any particular assessment year.

Be that as it may, we do not find force in extreme position taken by the assessee that in no circumstance an order under Section 132(5) can be considered a relevant piece of material for framing of necessary belief before initiating proceedings under Section 148. Undoubtedly, when any order like under Section 132(5) may contain the material which may have relevant contents for the purpose of holding belief requisite for initiating proceedings under Section 148

and when brought to the notice of Assessing Officer like any other material, an order under Section 132 (5) to provide such foundation also has to be judged on the touch stone of having relevant nexus to the formation of belief.

We have already noticed above the quantum of assets found during search and quantum of assets seized and the income from undisclosed sources surrendered by the assessee in the course of statement under Section 132(4). We have also noticed that assessee has surrendered his income from business to the tune of Rs.24,00,000 and he has also said that this undisclosed income is represented in the form of assets found during search. It is not in dispute before us that said Rs.24,00,000 which has been surrendered during the course of search has been subjected to estimate in different assessment year and is not related to assessment year 1986-87 in question. In this background, reading of order under Sec. 132(5) clearly goes to show that it has remanded the income from undisclosed sources to the assets seized from the assessee and explanation furnished by the assessee in respect thereof. Apparently, once the assessee has surrendered the income from his business to the tune of Rs.24,00,000 represented by the assets found during search and the same has been subjected to assessment, the question of considering the very same assets as representing income from undisclosed sources other than

surrendered by the assessee could not be reached reasonably by any person of ordinary prudence in the facts and circumstances. This further goes to show that order under Section 132(5) was merely an exercise to estimate the total tax liability that may arise as a result of search and to retain assets worth that value for the purpose of discharge of such liability as and when it crystallises into a demand on completion of regular assessment proceedings. It is not directed to find income from undisclosed sources for each assessment year.

We have already noticed the bifurcation of income surrendered by the assessee. The assessment order under Section 132(5) refers to gold and silver ornaments found during search and seizure and investment made in immovable properties and about unspecified documents.

The discussion in respect of loose papers found during the search shows that officer passing order under Section 132 (5) had not really made any inquiry thereto. He records that assessee has said that “unless specific query with reference to specific seized document is raised, it is impossible to submit an explanation”. He further says that “he would certainly like to get explanation about each paper and not a few ones”. He also records that “assessee is willing to furnish fullest and correct explanation with

reference to any seized documents as may be required" and he goes on to say that "he will be getting fullest opportunity at the time of regular assessment to explain his case. At present, I would treat the transactions of loose papers as undisclosed business activity" and close discussion with following observations:

> "It will be necessary for the assessee to explain the above entries satisfactorily at the time of regular assessment. At present, the above undisclosed income is also taken into consideration for estimating anticipated liability."

Similarly, considering the accounts showing `making charges', the Assessing officer records as under:-

> "This appears to be account showing making charges received by the assessee during the period 1.8.88 to 15.11.188. This is a sort of cash book showing every day opening balance as Rs.111/- and then receipts are entered for a day like Rs.151/-, 832/-, 2012/-, 2300/-, 3086/- etc. The total receipts for this period are around Rs.41,000/- which gives a broad indication of assessee's business income. Taking these receipts as base for three months earning, the average monthly receipts can be estimated around Rs.12,000/-, thus, teh

> annual income may be estimated safely around Rs.1,50,000/- leaving aside the matter for earlier years to be investigated by the Assessing Authority, the current income will have to be estimated around Rs.1,50,000/-, apart from undisclosed investment as discussed above."

Apparently, Officer passing order under Section 132(5) had made additions by referring to bunch of loose papers and the account showing making charges receipts by the assessee during the period 1.8.88 to 15.11.88 without applying their relevance for holding belief on that basis that income for assessment year 1986-87 had also escaped assessment.

We have already noticed above that the assessee had surrendered in all Rs.29,23,000 as income from different sources detailing Rs.25,00,000/- as income from his business including money lending and pawning, Rs.3,73,000/- as investment in house and Rs.1,50,000/- as undisclosed income utilised in marriage expenses. All these were considered income pertaining to current assessment year. Even computing the estimated tax liability, investment in the house has been shown to be in assessment year 1988-89 and that did not relate to assessment year 1986-87. The additions made in the name of investment and business income for assessment year 1986-87 were referable only to discussion which we have referred to above i.e to

say on the basis of loose papers and estimated income of business on the basis of accounts of making charges examined by the concerned officer had entries for the period 1.8.88 to 13.11.88 only. Thus, estimated income from undisclosed sources for assessment year 1986-87 under Order 132(5) were not founded on any specific material referable to assessment year 1986-87 could not provide any nexus and basis for formation of necessary belief about escapement of income for assessment year 1986-87 by the assessing officer before issuing notice under Section 148.

There is yet another aspect of the matter, the assessee during the course of his examination under Section 132(4) had surrendered income of Rs.29,23,000/-, as aforesaid, and has clearly stated that same is represented through assets found during search. Question of initiating proceedings for reassessment in respect of surrendered income on the basis of value of assets found during the course of search would not arise as the same can be taken outrightly as income from undisclosed sources, in the assessment of assessment year during previous year during which search was conducted and such disclosure had been made, yet the order under Section 132(5) relied on by the assessing officer for recording his reasons reveals in detail the item of assessment found during search for the purpose of estimating income as a result of unexplained investment in those assets. That

is only to point out that really speaking, order under Section 132(5) was focused on estimating liability for the purpose of retaining the assets found during search and seizure and not on any other issue.

Nothing has been stated either in order under Section 132(5) or the reasons recorded by the assessing officer that any asset or investment other than recorded under Order 132(5) were found and were not explained by the assessee during the course of search.

In the circumstances, we are of the opinion that the conclusion arrived at by the assessing officer before issuing notice under Sec. 148 is not his own but a borrowed satisfaction held by the Assistant Commissioner of Income Tax, Ward-I, Jodhpur while making order under Sec. 132(5) retaining the seized assets until regular proceedings are held, pertinently leaving it to be investigated by the assessing officer as income from undisclosed sources of business for relevant assessment year prior to current assessment year for which no material before the assessing officer or the authority passing the order under Sec. 132(5) has been placed.

Apparently, the Assessing Officer has not applied its mind to the facts and circumstances before him and was solely dependent on the conclusion noticed under Sec. 132(5) for the purpose of retaining assets, apart from surrender Rs.24,00,000 as income from

business and Rs.5,23,000 as income represented through unexplained investment and expenses representing the assets found during the course of search and which it has been accepted as assessment order for the current year, no other material was before the Assessing Officer to hold on the basis of which the subjective satisfaction that the income for Assessment Year 1986-87 has escaped assessment could be reached.

This is beside the fact that the conduct of the Assessing Officer in maintaining record is far from satisfactory standard and he has been found manipulating records at least for the assessment year 1988-89, affecting his credibility in this regard as the initiation of proceedings for assessment year in question is a part of the same exercise.

That weakens the credibility of correctness of record itself but we have found the conclusion independent of the point by referring to the material which has been placed before us which has gone into consideration as per Assessing Officer himself.

Before parting with this discussion, we may refer to contention of Revenue that since he has referred to the seized documents and the order under Sec. 132(5), the Court must look to all the material which was in possession of the assessing officer and details given in the order under Sec. 132(5). We do not

find any substance in this contention.

The subjective satisfaction is state of mind which could be judged through reason recorded by the Assessing Officer before initiating proceedings under Sec. 148. The statute requires recording of such reasons prior to issuance of notice under Section 148 with an object to keep a check on unruly horse of subjective satisfaction and if there is challenge to assumption of jurisdiction, the foundation of action can be tested on the basis of state of mind revealed in expression of reasons.

The limited ground on which the subjective satisfaction of the Assessing Officer could be judged is to be found in those reasons through which the Assessing Officer discloses his mind. To travel beyond the territory of reasons recorded and material specified therein would be to substitute the satisfaction of Court for that of Assessing Officer, which is not permissible.

In these circumstances, we are in agreement with the Tribunal that the satisfaction about escapement of income for assessment year 1986-87 was founded without any relevant material going into consideration of the Assessing Officer and the material which has been stated in the reasons recorded by the Assessing Officer does not connect any existing

material which could relate to the assessment year in question having nexus for formation of belief by him that income for assessment year 1986-87 has escaped assessment. Significantly, the Assessing Officer has also not recorded his satisfaction that under-estimate was due to any failure on the part of the assessee to disclose his income for relevant assessment year in question.

As a result, the appeal fails and is hereby dismissed.

(BHAWAROO KHAN),J. (RAJESH BALIA),J.

Rm/-